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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. 538 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE
LAST WILL AND TESTAMENT OF RUDOLPH J.
FERES, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 26, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 558

BERNICE B. FERES, AS EXECUTRIX UNDER THE
LAST WILL AND TESTAMENT OF RUDOLPH J.
FERES, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. 1]

**IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

BERNICE B. FERES, as Executrix under the Last Will and
and Testament of Rudolph J. Feres, Deceased, Plain-
tiff-Appellant,

v.

THE UNITED STATES, Defendant-Appellee

STATEMENT UNDER RULE 15

The action was commenced August 19, 1948.

The plaintiff is Bernice B. Feres, as Executrix under the Last Will and Testament of Rudolph J. Feres, deceased, and the defendant is the United States. There has been no change in the parties since the commencement of the action.

The complaint was filed August 19, 1948. No answer has been filed as this appeal is made from an order dismissing plaintiff's complaint on a motion by defendant.

The defendant has not been arrested, no bail has been taken and no property has been attached or arrested.

There has been no trial, and the motion which gave rise to the order appealed from was argued before Hon. Stephen W. Brennan, United States District Judge, Northern District of New York, on November 8, 1948.

No question was referred to a commissioner, master or referee.

The order dismissing the complaint was entered February 10, 1949.

The appeal was taken April 5, 1949.

[fol. 2] **IN UNITED STATES DISTRICT COURT, NORTHERN DIS-
TRICT OF NEW YORK**

ORDER APPEALED FROM.—Filed February 10, 1949

This cause came on for hearing on defendant's motion to dismiss the action because the court lacks jurisdiction of the subject matter of the action for the reason that this is a suit brought against the United States of America

which has not consented to be sued or waived its immunity from suit under the circumstances alleged in the complaint and on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted and the Court having heard the argument of counsel and being fully advised, it is

Ordered that the defendant's motion be and the same hereby is granted and that the complaint be and it is hereby dismissed and the action be and it is hereby dismissed.

Dated: Utica, New York, February 10, 1949.

Stephen W. Brennan United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

Appearances:

Morris Pouser, Attorney for Plaintiff, 101 Washington Avenue, Endicott, New York.

Irving J. Higbee, United States Attorney, Attorney for Defendant, Federal Building, Syracuse, New York; Mr. Port, of Counsel.

Motion to Dismiss Complaint.

Argued November 8, 1948; Submitted December 1, 1948; Decided January 5, 1949.

DECISION OF BRENNAN, D. J.

BRENNAN, D. J.:

Plaintiff brings this action under the provisions of the Federal Tort Claims Act, 28 U. S. C. A. 921, etc., to recover a money judgment by reason of the death of her husband, Rudolph J. Feres, on December 10, 1947.

The decedent, a First Lieutenant in the United States Army, was on active duty at the military post known as Pine Camp, New York. It is alleged that on December 10, 1947 the barracks building in which the defendant was quartered was destroyed by fire, due to the negligence of those employees of the defendant charged with the maintenance of said structure. Lieutenant Feres died in the fire.

The defendant moves to dismiss the complaint because of the lack of jurisdiction in this Court of the subject [fol. 4] matter of the action, and upon the ground that the complaint fails to state a claim upon which relief can be granted.

The question involved in this motion is whether or not the action may be maintained under the Federal Tort Claims Act.

An examination of the Act itself and the reported cases which have been urged as precedents upon this motion all indicate that the determination of the question is a close and difficult one. It is the Court's information that all final decisions which have resolved the question are awaiting appellate court action and interlocutory orders are awaiting the trial of the actions and possible subsequent appeal. Under such circumstances, it would seem unwise to discuss the matter at length since it is evident that forthcoming decisions will resolve any existing difference of opinion.

The conclusion is reached that the motion must be granted upon the authorities of *United States v. Brooks*, 169 F. 2d 840, and *Jefferson v. United States*, 77 F. Supp. 706.

Order may be submitted accordingly.

Stephen W. Brennan, U. S. D. J.

[fol. 5] IN DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF NEW YORK

COMPLAINT

Plaintiff complains of the defendant and alleges:

1. The action arises under the Federal Tort Claims Act, 28 USCA 921 *et seq.*; Chapter 753, Title IV, Section 410, 60 Stat. 843, Laws of 1946; amended August 1, 1947, Chapter 446, Section 1, 61 Stat. 722.

2. Heretofore and on May 24, 1948, the Surrogate's Court of Broome County, State of New York, did duly issue and grant to plaintiff, Bernice B. Feres, Letters Testamentary upon the estate of Rudolph J. Feres who died a resident of Broome County as hereinafter set forth; and

Bernice B. Feres, the plaintiff, has duly qualified as such executrix, and is duly authorized to maintain this action.

3. At all of the times hereinafter mentioned, Rudolph J. Feres was in the employ of the defendant as a First Lieutenant in the Army of the United States, and was compelled to and did, as such employee, work and be quartered at military posts maintained by the defendant and was compelled to and did maintain his quarters in such places as designated by the defendant, and its employees.

4. On December 10, 1947, the aforesaid Rudolph J. Feres, while on active duty in service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post or station of the United States, to which barracks the decedent had been assigned and required to be quartered in by his superior officers who are or were employees of the defendant, acting within the scope of their office or their employment.

5. Upon information and belief, the said fire which caused decedent's death was caused by a defective heating plant in said barracks in which decedent was quartered.

6. The employees of the defendant, while acting within the scope of their office or employment, were negligent in assigning and requiring said Rudolph J. Feres to be quartered in a barracks which said employees well knew, or should have known, was unsafe due to a defective heating plant, and in failing to furnish said decedent a safe and proper place to work and in which to be quartered while in the employ of the defendant; and an employee of the defendant was negligent while acting within the scope of his office or employment in neglecting and omitting to perform his duties as fire guard of the area in which aforesaid barracks was situated, and in failing and neglecting to observe the said fire or to warn the decedent of the said fire; and the employees of defendant, while acting within the scope of their office or employment, were negligent in failing properly to supervise the said fire guard and to direct the manner in which he performed his duties and in failing to provide a competent fire guard for the area in which the said barracks in which decedent was killed were situated.

7. Decedent, Rudolph J. Feres, left him surviving a widow, Bernice B. Feres, of the age of 29 years, who is

plaintiff herein, and his infant son, Ward B. Feres, born December 25, 1946; Rudolph J. Feres was 31 years of age at the time of his death, and prior thereto, was in good health and in possession of all of his faculties and was employed as a First Lieutenant in the Army of the United States; that said widow and infant child were dependent [fol. 7] on said Rudolph J. Feres for their maintenance, support and education, and that they have been damaged by his death in the amount of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred Thousand Dollars (\$100,000.00) interest and costs.

Morris Pouser, Attorney for Plaintiff, Office & P. O.
Address: 101 Washington Avenue, Endicott, New
York.

[fol. 8] IN DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION TO DISMISS

Please Take Notice that the undersigned will move this Court at the Court Room, Federal Building, Syracuse, New York, on the 8th day of November, 1948, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order (1) dismissing the action because the Court lacks jurisdiction of the subject matter of the action for the reason that this is a suit brought against the United States of America which has not consented to be sued or waived its immunity from suit under the circumstances alleged in the complaint and (2) to dismiss the action on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted.

Yours, etc., Irving J. Higbee, United States Attorney,
Attorney for Defendant, Office & P. O. Address: Federal Building, Syracuse 1, New York.

To: Morris Pouser, Attorney for Plaintiff, 101 Washington Avenue, Endicott, New York.

[fol. 9] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL

Notice is hereby given that Bernice B. Feres as Executrix under the Last Will and Testament of Rudolph J. Feres, deceased, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order dismissing the complaint herein entered in this action on the 10th day of February, 1949.

Dated, Endecott, New York, April 5, 1949.

Morris Pouser, Attorney for Appellant, Bernice B. Feres, as Executrix. Office & P. O. Address, 101 Washington Avenue, Endicott, New York.

[fol. 10] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the plaintiff and the defendant that the Record on Appeal in the plaintiff's appeal to the United States Circuit Court of Appeals for the Second Circuit from the Order of this Court dated February 10, 1949, dismissing the plaintiff's complaint herein, shall contain the following: The Order dismissing the plaintiff's complaint dated February 10, 1949; the Decision of Hon. Stephen W. Brennan, District Judge, dated January 5, 1949; the Plaintiff's Notice of Appeal; the Plaintiff's Complaint; the Defendant's Notice of Motion and this Stipulation.

Dated, June 23, 1949.

Morris Pouser, Attorney for Plaintiff, Office & P. O. Address, 101 Washington Avenue, Endicott, New York. Irving J. Higbee, United States Attorney, Attorney for Defendant, Office & P. O. Address, Federal Building, Syracuse 1, New York.

[fol. 11] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record on appeal of the said District Court in this action as agreed on by the parties.

Dated: July 5, 1949.

Morris Pouser, Attorney for Appellant, Office and Post Office Address, 101 Washington Avenue, Endicott, New York. Irving J. Higbee, United States Attorney, Attorney for Appellee, Office and Post Office Address, Federal Building, Syracuse 1, N. Y.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1949

No. 61

(Argued October 10, 1949. Decided November 4, 1949)

Docket No. 21426

BERNICE B. FERES, as Executrix under the Last Will and
Testament of Rudolph J. Feres, Deceased, Plaintiff-
Appellant,

against

THE UNITED STATES, Defendant-Appellee

Before: Augustus N. Hand, Chase and Frank, Circuit
Judges.

Appeal from the United States District Court for North-
ern District of New York

From an order dismissing the above entitled action
brought under the Federal Tort Claims Act, the plaintiff
appeals. Affirmed.

[fol. 14] Morris Pouser, Attorney and counsel for
Plaintiff-Appellant. H. G. Morison, Assistant At-
torney General, Irving J. Higbee, United States
Attorney, Edmond Port, Assistant United States
Attorney, and Paul A. Sweeney, Massillon M.
Heuser and Morton Hollander, Attorneys, Depart-
ment of Justice, for Defendant-Appellee.

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal from an order dismissing an action
brought by the executrix under the will of Rudolph J. Feres,
deceased, against the United States to recover damages
under the Federal Tort Claims Act. The decedent, an
army lieutenant, while on active duty in the service of the
United States, was killed by fire in a barracks in Pine Camp,
New York, a military post of the United States in which he
had been required to be quartered by superior officers.

The complaint alleged negligence on the part of the offi-
cers who required the deceased to be quartered in barracks

Furthermore, the argument of the Government completely ignores the proposition that there is no vested right to a pension or other benefit which is merely a bounty from a grateful Government which Congress could recall, limit, destroy or change (*In re Lindquist Estate*, 144 Pac. 2d 438, 154 Pac. 2d 879, Cert. denied 325 U. S. 869, 89 L. Ed. 1988).

The argument of the Government is that a *dependent* of a soldier has no *rights* under the Federal Tort Claims Act because the soldier may have some *privileges* under some other acts enacted at different times and for totally unrelated circumstances and purposes.

In the *Brooks* case, *supra*, the soldiers were on furlough yet recovery was allowed.

In *Santana v. United States*, 175 Fed. 2d 320, the United States Court of Appeals, First Circuit, June 10, 1949, 17 Negl. Cases 89, the soldier was a discharged veteran and received injuries at a veteran's hospital which resulted in his death when he returned for medical treatment, yet the Court of Appeals said he was entitled to recovery.

In *Griggs v. United States*, the Court of Appeals for the Tenth Circuit Fed. 2d , November 16, 1949, 17 Negl. Cases 562, the soldier was not on combat duty and was admitted under official orders to the army hospital at Scott Field Air Base at Illinois for the purpose of surgery and treatment. While at that hospital and performing no military service, after hostilities had ceased, he received injuries caused by the negligence and unskillful acts of members of the army Medical Corps, acting within the scope of their office of employment, from which he died. His legal representative was held entitled to maintain an action under the Federal Tort Claims Act.

There are other cases in the District Courts allowing recovery.

Alansky v. Northwest Air Lines, 77 Fed. Supp. 556.

Skeeles v. United States, 72 Fed. Supp. 372.

Sampson v. United States, 79 Fed. Supp. 406.

We do not think that Congress intended the subtle and fine distinctions in the application of the Act which have now grown up by these various decisions.

If we adopt the philosophy and construction of the Court below in this case, a deserter, or his dependents, would be entitled to recovery but the plaintiff in this case would not be. Not only is this result unwarranted but such construction is throwing the application of the Act into confusion.

The proximate cause of decedent's death was the negligence of a third party, an employee of the Government, and not the performance of any duty as a soldier.

If it were intended to draw distinctions between members of the Armed Services, depending upon their different status at different times as to whether they are entitled to recovery, it would have been very easy for Congress to have said so. It is not for the Courts to draw these distinctions and exceptions, nor should they be a part of the Act except by further congressional action if reasons of policy or otherwise require it.

Upon all that is herein set forth, the petitioner prays that her application for a writ of certiorari should be granted and that the decision of the Court below should be reviewed and reversed.

Respectfully submitted,

MORRIS POUSER,
LEXOW & JENKINS,
Attorneys for Petitioner,
Office & P. O. Address,
70 Lafayette Avenue,
Suffern, New York.

DAVID H. MOSES,
Of Counsel.

ROBERT E. REW, JR.,
On Brief.